Renewables Committee Decision
on Petition of Comcor Energy LLC's
Ox Mountain Landfill Gas Project
Funding Award Agreement #REN-98-004

Summary

This decision is issued in response to the petition submitted by Comcor Energy LLC ("CELLC") to the California Energy Commission (Energy Commission) pursuant to the Energy Commission's *Overall Guidelines for the Renewable Resource Trust Fund, Fifth Edition (April 2002)*. CELLC submitted its petition to the Energy Commission's Environmental and Energy Infrastructure and Licensing Committee on December 19, 2002 asking to extend the funding award for the Ox Mountain Landfill Gas Project ("Ox Mountain").

The Energy Commission subsequently assigned oversight of the Energy Commission's Renewable Energy Program and therefore the authority to review this petition and render a decision to the Renewables Committee ([Committee] currently Commissioner John L. Geesman, Presiding, and Commissioner Jackalyne Pfannenstiel, Associate).

Pursuant to its adopted guidelines, the Energy Commission may extend a project's funding award if it finds that the delays in a project's on-line date were the result of circumstances beyond the developer's control. Based on CELLC's petition, the Committee finds that the delay for Ox Mountain was the result of circumstances beyond CELLC's control, and recommends that the project's funding award and required on-line date be extended to December 31, 2005, and that the project not receive any incentive payments for generation after December 30, 2010.

Ox Mountain is a 10 megawatt landfill gas project located in Half Moon Bay. The project was a winner in the Energy Commission's June 1998 auction to award production incentives to new renewable resources. The Energy Commission approved the project's funding award agreement (REN-98-004) for $3,196,854.47 in April 1999.

At the time of the June 1998 auction, Ox Mountain was owned by Browning Ferris Gas Services, Inc. (BFGSI), a subsidiary of Browning-Ferris Industries (BFI). BFGSI submitted a project schedule showing that Ox Mountain would be on-line by May 1, 2000, well before the January 2002 on-line date required in NOA 500-97-506. However, the project has changed ownership, experienced delays, and now reports a revised on-line date of December 31, 2005. The current project developer has therefore petitioned the Energy Commission for an extension of the project's on-line date.

Ox Mountain changed ownership several times since the June 1998 auction. BFGSI was the original owner in June 1998. In 1999, Allied Waste Industries, Inc. acquired BFI

and its landfill operations, along with the stock of BFGSI and its assets, including the development rights to Ox Mountain. In April 2000, Gas Recovery Systems, Inc. (GRS) purchased all the BFGSI stock from Allied.

According to CELLC, as part of these transactions the project development rights for Ox Mountain remained attached to the BFGSI stock, so there was no need to transfer or assign any development rights, including the Energy Commission's conditional funding award, to another entity. When GRS purchased the BFGSI stock, they procured the rights to the funding award. GRS then changed BFGSI's name to Gas Recovery Services, Inc., which was a name change only and did not affect the corporate structure.

Gas Recovery Services Inc. subsequently merged with GRS. This action also did not require any transfer or assignment of the funding award agreement because of the merger of the original corporation. According to CELLC, under merger doctrine, all rights and assets of the merging companies are absorbed by the surviving corporation at the time of transfer.

In October 2002, CELLC purchased the development rights of Ox Mountain from GRS, including the rights to the funding award agreement. In May 2003, CELLC submitted a formal request for change of ownership of Ox Mountain from GRS to CELLC.

GRS submitted a formal petition to the Energy Commission on May 17, 2002 asking to have the award for Ox Mountain Project extended pursuant to the amendment of Public Utilities Code section 383.5(c)(2)(B). The petition identified several reasons for the delays in project development, but did not provide a revised on-line date nor did it include the information required for such petitions that was identified in the Overall Guidelines for the Renewable Resources Trust Fund. Staff determined that the petition was incomplete and notified GRS of that fact in June 2002.

CELLC then submitted a revised formal petition to the Energy Commission on December 19, 2002. However, the revised petition identified the ownership change from GRS to CELLC. Therefore, staff notified CELLC that the project's current ownership would have to be established before any determination could be made on the petition for extension.

In May 2003, Comcor Energy LLC submitted a formal request for change of ownership. The request clearly identified the chain of ownership from the original awardee, BFGSI, to the current owner, CELLC.

After reviewing the petition for extension and deeming it complete, the Committee determined that a hearing to address the petition was unnecessary and that it would exercise its discretion to issue a decision based on the petition alone.

Committee Decision

Based on CELLC's petition, the Committee finds that the delay in on-line date for Ox Mountain was a result of circumstances beyond CELLC's control. CELLC's petition states that the delay resulted from changing market conditions after the first auction was held and the developer's inability to secure a long-term power purchase agreement as a result of those changes. Neither of these circumstances were within CELLC's control.

CELLC's petition demonstrates that the developer has made reasonable efforts to obtain a power purchase agreement and has been unable to do so. According to CELLC, it must have a signed power purchase agreement in place to obtain the financing necessary to begin construction on the project. CELLC states that once an acceptable power purchase agreement is obtained and construction is authorized by the permitting agency, CELLC is prepared and will begin construction expeditiously.

The Committee recommends that Ox Mountain have its funding award extended until December 31, 2005, and that no incentive payments be made under this award for any generation that occurs after December 30, 2010. Although Public Utilities Code section 383.5(d)(5) and Public Resources Code section 25743(e) allow for longer extensions, stating that "the date that a project begins electricity production may not extend beyond January 1, 2007," the Committee believes that extending the on-line date for Ox Mountain beyond December 31, 2005 would tie up program funds unduly and be contrary to the public policy goals of the program.

The Committee does not believe an award reduction for Ox Mountain is justified at this time as long as the project is on-line by December 31, 2005. CELLC appears to have worked diligently and in good faith to obtain a power purchase agreement, and given the circumstances, the Committee recommends that Ox Mountain not have its funding award reduced. However, if the project is not on-line by December 31, 2005 or by a reasonable period of time thereafter, the Committee recommends that the Energy Commission re-evaluate the status of the project to determine if an award reduction or cancellation is justified.

Under California law, a project awarded funding from the Energy Commission's New Renewable Resources Account remains eligible to receive five years of funding even if the project is not operational by January 1, 2002, if the Energy Commission finds the delayed operation was due to circumstances beyond the project developer's control. This law is now set forth in Public Utilities Code section 383.5(d)(5) and Public Resources Code section 25743(e), but was previously set forth in Public Utilities Code section 383.5(c)(2)(B).

To make the requisite finding, the Energy Commission must determine if there were circumstances beyond CELLC's control that prevented the project from coming on-line by January 1, 2002.

In its petition, CELLC states that reasons for the delay are: (1) market conditions for sales from new renewable projects, and (2) lack of available power purchase agreements.

CELLC contends that market conditions for sales from new renewable projects have changed drastically since the first auction took place. According to CELLC, power purchase agreements have not been readily available because of the following conditions:

- Pacific Gas and Electric Company's (PG&E) bankruptcy
- Southern California Edison's (SCE) lack of creditworthiness
- Uncertainty surrounding future efforts of the California Department of Water Resources (CDWR)
- Regulatory uncertainty of the future of the restructured electricity market in California
- Bankruptcy of the California Power Exchange
- Inability of the California Power Authority (CPA) to either enter into or broker power purchase contracts.

Further, CELLC states that until recently, the only reliable market for new renewable sales was through the California Independent System Operator on a real-time basis, which does not provide the financial terms necessary for development. CELLC states that these market conditions were beyond its control.

CELLC also points out that while California's Renewable Portfolio Standard legislation will hopefully yield sales opportunities for CELLC, implementation of the legislation by regulatory agencies is also beyond its control.

CELLC contends that due to the lack of a signed power purchase agreement and of any robust real-time renewables market in California, CELLC has been unable to finance construction of Ox Mountain. In an attempt to address these problems, CELLC has actively sought sales opportunities for the output from Ox Mountain by participating in any solicitations for power that have been offered.

Because of the location of the project, PG&E is the logical primary candidate for a power purchase agreement. However, CELLC also evaluated other markets to determine whether wheeling issues could be resolved to allow a power purchase agreement with interconnection points in southern California.

As a result of PG&E's ongoing Chapter 11 bankruptcy, PG&E did not enter into any new power purchase agreements with renewable projects prior to the fall of 2002, which foreclosed the ability of CELLC to sell its power to the utility. CELLC argues that PG&E's activities were beyond its control.

Following CPUC adoption of D. 02-08-071, California's investor-owned utilities conducted a solicitation for renewable projects. CELLC submitted a bid for Ox

Mountain solely to PG&E due to cost-prohibitive wheeling requirements for SCE and San Diego Gas and Electric Company. PG&E did not accept the CELLC proposal.

CELLC has also approached the CPA regarding the possibility of obtaining a signed Letter of Intent (LOI). The purpose of the LOI was to identify projects with which the CPA could have contracted directly and served as a broker to sell the power to the CDWR or directly to the IOUs. However, due to lack of funding, the CPA did not negotiate or execute any LOIs. CELLC also approached the CDWR directly, without success, regarding the possibility of a power purchase agreement. CELLC also approached the Southern California Public Power Authority, a municipal utility, with a proposal for renewable energy sales. That proposal was rejected. Finally, CELLC submitted a bid to Southern California Edison. CELLC indicates that they were recently put on a “short list” of bidders to negotiate a PPA.